

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SINGULAR COMPUTING LLC,)
)
Plaintiff) Civil Action
)
) No. 19-12551-FDS
vs.)
)
GOOGLE LLC,)
Defendant)

BEFORE: MAGISTRATE JUDGE DONALD L. CABELL

STATUS CONFERENCE CONDUCTED BY VIDEO CONFERENCE

John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, MA 02210

July 22, 2021
1:30 p.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiff:

3 Prince, Lobel, Tye, LLP, by MICHAEL ERCOLINI, ESQ.,
4 KEVIN GANNON, ESQ., One International Place, Boston,
Massachusetts 02110;

5 McCarter & English, LLP, by BRIAN M. SEEVE, ESQ.,
6 and THOMAS R. FULFORD, ESQ., 265 Franklin Street, Boston,
Massachusetts 02110

7 For the Defendant:

8 Keker, Van Nest & Peters LLP, by MATTHIAS A. KAMBER,
9 ESQ., MICHELLE YBARRA, ATTORNEY, and ANNA PORTO,
10 ATTORNEY, 633 Battery March Street, San Francisco,
California 94111.

11 Wolf, Greenfield & Sacks, P.C., by NATHAN R. SPEED,
12 ESQ., 600 Atlantic Avenue, Boston, Massachusetts 02210;

13

14

15

16

17

18

19

20

21

22

23

24

25

1 PROCEEDINGS

2 THE CLERK: This is the case of Singular
3 Computing, LLC vs. Google, LLC, Civil Action
4 Number 19-12551 will now be heard before this court.

5 Would counsel please identify themselves for the
6 record.

7 THE COURT: Starting with plaintiff.

8 MR. SEEVE: This is Brian Seeve of Prince,
9 Lobel, Tye representing plaintiff Singular Computing, LLC
11:01AM 10 in this matter, and I believe I'm joined by several
11 colleagues. I'm not sure if they've joined the call yet.

12 MR. GANNON: Your Honor, Kevin Gannon, no video,
13 but I'm on as well.

14 MR. FULFORD: Tom Fulford.

15 THE COURT: I'm sorry, could you repeat your
16 name again. We have a court reporter, so I want to be --
17 I want to make sure she's able to capture everything. So
18 who was that? Oh, Tom Fulford, F-u-l-f-o-r-d. All
19 right. Good morning.

11:01AM 20 MR. GANNON: Yes, I'm Kevin Gannon on as well
21 for Singular.

22 THE COURT: All right. That sounded a little
23 garbled, it sounds, but the screen that lit up was Kevin
24 Gannon.

25 MR. ERCOLINI: Michael Ercolini for Singular.

1 THE COURT: Good morning.

2 MR. ERCOLINI: Good morning, your Honor.

3 MR. KAMBER: As for us, your Honor,
4 Matthias Kamber of Keker, Van Nest & Peters on behalf of
5 Google.

6 THE COURT: Good morning.

7 MR. KAMBER: Good morning.

8 MS. YBARRA: Good morning, your Honor,
9 Michelle Ybarra, Keker, Van Nest & Peters also on behalf
10 of Google.

11:02AM

11 THE COURT: Good morning.

12 MR. SPEED: Good morning, your Honor,
13 Nathan Speed from Wolf, Greenfield & Sacks also on behalf
14 of Google.

15 THE COURT: Good morning.

16 MS. PORTO: Good morning, your Honor, Anna Porto
17 also on behalf of Google.

18 THE COURT: Good morning to you. Okay. Let me
19 just set the stage for this. This all began with us

11:02AM

20 getting an e-mail from you folks I think starting from
21 Singular, and Google has weighed in, and it does give me
22 occasion to maybe reaffirm or restate something that I
23 said last time we got an e-mail from you guys, I'm fine
24 with getting e-mails asking for opportunities to sit and
25 talk to see if we can help the parties work through

1 matters, but, again, when we typically do that, it's
2 usually for something that's much smaller, much more
3 bite-sized, much simpler than what we've got going on
4 here.

5 Usually it arises in a context where counsel
6 realizes in talking that they may have a disagreement on
7 something, nobody wants to file a motion, per se, so they
8 say let's talk to the Court and maybe getting a third
9 person weighing in or something like that.

11:03AM 10 What we got here is more involved in that. It
11 does appear to relate in part to prior rulings I've made,
12 but it also suggests there are anticipated issues that
13 the parties may have some concerns about as well, so it's
14 kind of a multi-part beast.

15 So the informal, off the record type conferences
16 that we are willing to have are not suitable for things
17 like that. So I asked Ms. Russo to make this a
18 conference. This is somewhere in between what I usually
19 envision at a contested hearing where there's a pending
11:03AM 20 motion. We do not have a pending motion. I do know that
21 Google filed a motion for protective order, but there's
22 really no pending motion before me, so this is somewhere
23 in the middle.

24 We do have a court reporter, so this is on the
25 record, so I want there to be a certain amount of order

1 to this. We don't have unlimited time, so we're going to
2 get to it in a moment because we have other matters going
3 on, but to the extent any of our conversations implicate
4 prior rulings of mine, I think it's perfectly appropriate
5 for us to talk about those.

6 The parties can remind me of things I may have
7 said or done or how I ruled, and I will try to act
8 consistent with anything that I've said or done in the
9 past or understandings that the parties have had.

11:04AM 10 If we're talking about future stuff, well, I'm
11 not sure we'd get into that today, particularly since
12 Google has filed a motion for protective order. I looked
13 at that just very quickly before I got on screen, and the
14 essence of that though appears to be actually
15 straightforward, which is really just make everybody play
16 by whatever our prior understandings and rulings
17 suggested, so maybe we get to that, maybe not, but
18 Singular, let me start with you, and let's start by
19 trying to frame things in terms of something that you
11:05AM 20 think is going on in this case that is contrary to
21 something I said or a ruling I made previously, and then
22 we'll see where the conversation takes us from there.

23 MR. ERCOLINI: If it's limited to that, your
24 Honor, I think we have two issues, although it does
25 implicate the motion to compel, the third issue, and

1 that's actually a very brief issue to talk about, but
2 basically in the past week, Google has effectively failed
3 to appear for three depositions.

4 The rule on this is pretty straightforward. If
5 the deposition is noticed, you need to appear, you can't
6 refuse to appear on account of your objections, and the
7 witness has to be prepared to testify as to the notice
8 topics, and a failure to prepare is tantamount to a
9 failure to appear -- so, failure to prepare, excuse me,
11:06AM 10 is tantamount to a failure to appear, as is the failure
11 to designate a witness, so the only exception is if you
12 have a protective order or if the motion for protective
13 order is pending. Neither is the case.

14 Last Friday, after about nine months of pursuing
15 a 30(b)(6) witness from Google on damages, Google showed
16 up with a witness who was not prepared to testify on the
17 topics for which he was designated. Instead, Google had
18 decided it was going to basically insert its own topic,
19 and that's what the witness would be prepared to testify
11:06AM 20 on.

21 This was not only in spite of there being no
22 protective order, more importantly, it was in defiance of
23 what the Court instructed Google to do in response to
24 Singular's motion to compel on June 30th.

25 Specifically, Google was to provide testimony on

1 any financial analysis or any analysis as to the value of
2 the accused TPUs, to other business units, including ads,
3 search, YouTube.

4 Google even claimed at the hearing that it
5 didn't object to providing that information to the extent
6 it existed, so we expected to get a witness who was going
7 to testify on that.

8 Instead, during the hearing, and to be clear, we
9 moved to compel on that topic. But I'll just read that
11:07AM 10 topic so everyone is clear on what it isn't, that it
11 actually lines up with what the Court instructed Google
12 to do because I don't want there to be any ambiguity
13 about it.

14 Just a moment. So, I'm just pulling the topic
15 up. So, quantifications, evaluations, estimates of the
16 value to Google of the benefits of using the accused
17 products is tied directly to the accused products,
18 including but not limited to improved search results,
19 advertising placements, increases in volume of search and
11:08AM 20 advertising, increased revenues, profits, advertising
21 rates, click-through rates, so we expected to get a
22 witness who could testify on this. I think it's pretty
23 clear that's within the scope of what Google said it was
24 going to provide.

25 Instead, Ms. Ybarra during the deposition when

1 the witness, Mr. Patil, was asked whether he was prepared
2 to testify on that topic, Ms. Ybarra responded. I just
3 want to pull up the quote so I'm not mischaracterizing
4 what Ms. Ybarra said.

5 Apologies, I have this highlighted, I just want
6 to make sure I get the right person in the transcript.
7 Bear with me just a moment. I'm sorry. Okay. So, when
8 we asked about the topic and what Mr. Patil did to
9 prepare, Ms. Ybarra objected and said Google agreed to
11:09AM 10 present Dr. Patil on this topic to testify about
11 comparisons between the accused v2 and TPU v3 and I'll
12 turn it into machine learning.

13 That was exactly what they had objected in the
14 responses and objections to the original notice, and we
15 had moved to compel after they had given this objection,
16 so Google brought its own topic to the deposition. The
17 witness wasn't prepared to testify. That's one of a host
18 of topics that basically followed this same pattern.

19 So we had another deposition on Tuesday, another
11:10AM 20 30(b)(6) witness, and the expectation was that he was
21 going to be prepared to testify, but after Friday, we
22 thought we should get confirmation on exactly what he was
23 prepared to testify on and what he wouldn't be. So we
24 sent Google an e-mail the day before, listed the topics
25 and asked them to confirm that he'd be prepared to

1 testify as to the scope of those topics, and if he
2 wasn't, what portions of the topics he would be prepared
3 to testify to and what portions he would not.

4 We asked three separate times for that
5 information. We did not get it, and the third time we
6 asked, Google threatened to cancel the deposition. They
7 then actually canceled the deposition and withdrew the
8 witness when we would not agree to accept their scope of
9 topics that they had imposed.

11:10AM 10 So we told them we were going to show up for the
11 deposition. They showed up for the deposition at 9:15,
12 and I will just read from the record what Ms. Ybarra said
13 before we started the deposition because we did not get
14 to ask a single question, but this was the demand that
15 Google made of us before we asked a single question.

16 We were prepared to proceed with the deposition
17 today only upon Singular's confirmation that Mr. Ercolini
18 will limit his questions properly to the scope of the
19 topics as agreed and discussed with the Court and not
11:11AM 20 seek additional time with Mr. Shafiei or any 30(b)(6)
21 witness on those same topics, so the expectation was we
22 were to waive any rights to seek further testimony from
23 Mr. Shafiei without asking the question about whether he
24 was prepared about any of the topics and to waive any
25 further questions on those 30(b)(6) topics regardless of

1 whether or not the witness was prepared.

2 THE COURT: Hang on. I'm not sure I processed
3 that statement that way. I thought the way you said it
4 was you were asking to confirm that you were going to be
5 limiting your questions to those topics that had been
6 agreed to either in court or by the Court, which is to
7 say we fought about this, we reached some equilibrium,
8 some agreement on what would be fair game, and we're
9 trying to get you to agree ahead of time you're going to
10 stay within the parameters of what we agreed to. Is that
11 incorrect?

12 MR. ERCOLINI: The problem was that there was a
13 clear disconnect on what the parties agreed to, and we
14 knew that based on the date of the Friday deposition and
15 the night before that they would not confirm what he was
16 prepared to testify on and what he would not be, and it
17 was clearly not an agreement with what the Court had
18 instructed them to provide a witness on.

19 THE COURT: So now going to this phrase about
20 what I had instructed because I know that we not too long
21 ago had a get-together that was kind of the informal
22 conference where it was just kind of us talking, and we
23 may have -- there may have been some understandings
24 reached then as distinguished from prior rulings of mine,
25 so what you're concerned about now, does it flow from an

1 actual ruling, or does it flow from some sort of informal
2 agreement that the parties reached when we last convened
3 on Zoom?

4 MR. ERCOLINI: There were two instructions
5 during that hearing. The first instruction was that --

6 THE COURT: When you say the hearing, I'm sorry.

7 MR. ERCOLINI: The hearing on June 30th that we
8 had. I can pull the transcript on that.

9 THE COURT: Let's not call that a hearing unless
11:13AM 10 it truly was. It says motion hearing, okay, actually,
11 all right, so that was the hearing.

12 MR. ERCOLINI: That's correct.

13 THE COURT: You're saying there were rulings
14 that I made. Let's focus on the rulings, and then let's
15 go back and tie this very briefly to what happened, and
16 then I want to hear either from Mr. Ercolini or
17 Ms. Ybarra about this.

18 MR. ERCOLINI: Okay. So the two rulings, the
19 two instructions were, and we discussed the topics
11:13AM 20 broadly because, as you said, we didn't have time to get
21 into the nitty-gritty of all of them.

22 THE COURT: Right.

23 MR. ERCOLINI: The instruction was to the extent
24 it existed, there was to be testimony, documents produced
25 showing the -- and I'd like to just get your language so

1 that it's clear in what Google agreed to so that I'm not
2 mischaracterizing. Just a moment.

3 So it was the analysis for the matter of the
4 value of these TPU products to the businesses, so to the
5 different business units, and I think again we read
6 Topic 32. That was within the scope.

7 The other topic was average costs for data
8 center, and that was in limits, so to speak. So we had a
9 number of topics that all fell under that umbrella, in
10 particular, fell under that umbrella. We knew on Friday
11 that they had not prepared a witness for it, so we sought
12 confirmation, and the following date -- I understand that
13 the Court may not parse what Ms. Ybarra said, but it's
14 conjunctive, and there was a requirement to do both, to
15 both confirm that we would not seek additional time with
16 Mr. Shafiei or any 30(b)(6) witness on these topics
17 later.

18 If there's any ambiguity, I can tell you, your
19 Honor, based on past experience, I know how any agreement
20 that was subject to past agreements would have been
21 characterized in a motion. We were not going to waive
22 the right to seek additional testimony on a witness that
23 we hadn't confirmed was prepared.

24 THE COURT: Okay. I think I've got the picture,
25 and I want to hear from Google, but let me just offer one

1 thought to things that you've said, which is the easy
2 part, which is, you know, this idea of requiring lawyers
3 or deponents or whomever to agree to conditions that, you
4 know, you won't seek to do something in the future, you
5 know, generally those are unattractive because nobody
6 knows what's going to happen in the course of a
7 proceeding, nobody knows whether there's going to be good
8 grounds to revisit a prior deposition, new information
9 becomes available, the deponent makes a statement that
11:16AM 10 reveals new information that comes up for the first time
11 or they say something that's inconsistent with some
12 discovery that's been produced, and to ask somebody at
13 the outset of a deposition to agree that there will be no
14 further inquiries, to me, I would be weary of that from
15 the beginning. I don't think they're necessary.

16 I understand the concern you have, you want to
17 make sure this is not an exercise of perpetuity, but
18 there are other ways to go around it. The rules provide
19 the mechanics and the guiding principles when somebody
11:16AM 20 says I want go back and ask more questions to somebody
21 about a certain subject.

22 Usually if there are protections to be provided,
23 they are pretty well set out in the rules, and I'm not a
24 fan of these, you know, essentially these limitations
25 that you're being asked to sign onto at the beginning, so

1 that's my thoughts on that.

2 Let's go to the essence on this. So, Mr. Kamber
3 or Ms. Ybarra, let me hear from you. You guys always
4 have the advantage in that you're dealing with not only
5 well-versed in way more facts and science than I, but I
6 tend to look at this big picture, so I know when I made
7 those rulings that Mr. Ercolini is talking about, you
8 know, those were kind of the two major points about which
9 we were having some conversation, and it struck me as
10 reasonable, Mr. Kamber, that they ought to be able to try
11 to explore what the overall value, the benefit to Google
12 of being able to use these components was or is, and
13 beyond that, I didn't feel like I was capable of getting
14 into the weeds to work out what that meant, so what's the
15 issue from your perspective?

16 It sounds like what Mr. Ercolini is saying is
17 these were questions that kind of fell safely into that
18 as well as trying to figure out what the cost of a data
19 center is, and thus, again, trying to be able to figure
20 out what the benefit and the value to Google was in this
21 case of these components. So what was problematic here?

22 MS. YBARRA: Your Honor, if I could start by
23 saying we completely agree with you that this issue is a
24 serious one and probably too complicated to fully resolve
25 here. We think we have a real serious dispute over the

1 scope of testimony that Google is obligated to provide
2 pursuant to Singular's 30(b)(6) notice, which, as your
3 Honor knows, has been the subject of months of meet and
4 confer, multiple status updates to the Court, multiple
5 motions to compel.

6 We think those disputes were resolved at the
7 June 30th hearing by the rulings your Honor made from the
8 bench, and I disagree with Mr. Ercolini's
9 characterization of events regarding the depositions last
10 Friday and this Tuesday, of course.

11 As you noted, we filed a motion for protective
12 order last night submitting a written record, letters and
13 e-mails and the transcript of Mr. Shafiei's deposition.
14 I think that contradicts what you just heard from
15 Mr. Ercolini.

16 Google did not unilaterally terminate the
17 deposition and did not fail to prepare a witness on the
18 topics for which the witness was designated, and if
19 you'll permit me to explain I think how we got here, I'd
20 like the opportunity to correct the record.

21 THE COURT: Well, that's fine, but what I really
22 want somebody to do is to give me a very concrete example
23 of a question that was put to the deponent or an area
24 where is clear we're going to be asking questions on this
25 subject matter, and Google said no, either the deponent

1 said I'm not prepared to answer that or Google said we're
2 not going to have the person answer that, just so I can
3 try to understand where the disconnect is here because
4 you seem to be saying he's got it all wrong, so help me
5 understand as you see it why there's no problem here.

6 MS. YBARRA: Well, your Honor, so
7 Dr. Nishant Patil is one of Google's Rule 30(b)(6)
8 witnesses. He was deposed last Friday. I don't believe
9 Dr. Patil answered in that manner to any of the topics
10 for which he was designated, and I say the topics for
11 which he was designated, as we discussed at the June 30th
12 hearing and as, you know, consistent with your Honor's
13 rulings on the record, Dr. Patil was Google's designee on
14 Topics 13. That topic concerns analyses prepared by
15 Google regarding the benefits of the accused TPUs or the
16 benefits attributable to the accused TPUs.

17 We talked about that at length at the hearing --

18 THE COURT: Right.

19 MS. YBARRA: -- and we presented Dr. Patil on
20 that topic, and he was prepared to testify and did answer
21 questions related to that topic.

22 I think the problem we have here is your Honor
23 made rulings, your Honor ordered Google to provide
24 30(b)(6) testimony consistent with what it had already
25 offered Singular by the time we got to the June 30th

1 hearing. You basically told us to make good on the
2 offers to compromise that we had memorialized in our
3 opposition brief, and in addition to that, you ordered
4 Google to provide a witness to testify about analyses
5 regarding the benefits attributable to the accused TPUs
6 as well as the average cost to build and maintain a data
7 center.

8 That latter topic, Google's 30(b)(6) witness who
9 was supposed to testify, Mr. Shafiei, was prepared to
10 testify on. You know, following the June 30th hearing,
11 Google wrote Singular twice, and in one of those is a
12 July 6th lengthy letter memorializing our understanding
13 of our obligations and commitments coming out of the
14 hearing citing your Honor's rulings from the bench.

15 Singular never disagreed with that. They didn't
16 disagree with your rulings at the hearing, and you asked
17 Mr. Ercolini multiple times have we resolved all of your
18 issues, have we resolved all the issues, have we talked
19 about everything you want to discuss?

11:22AM 20 So, the night before Mr. Shafiei's deposition
21 this past deposition at 4 p.m., Mr. Ercolini sent Google
22 an e-mail demanding that Mr. Shafiei, who was designated
23 on 14 topics, that Mr. Shafiei be prepared to testify as
24 to a quote, "the complete scope of those topics as
25 originally drafted."

1 Those topics include topics that your Honor
2 explicitly said were overbroad or were improper at the
3 hearing, and we had a number of exchanges with
4 Mr. Ercolini where he reiterated anything less than the
5 complete scope of the topics as drafted Singular will
6 consider a failure to appear.

7 It was clear from the night before that we had a
8 huge disagreement about what Google's obligations were
9 and what the thrust of your Honor's rulings of the
11:23AM 10 June 30th hearing meant regarding those obligations, and
11 we feel like Singular is acting like the hearing never
12 happened and the, you know, the agreements that we
13 reached with the Court or the rulings that the Court made
14 from the bench never happened, and it's seeking testimony
15 on the full scope of its original topics as drafted,
16 which is not what we left the June 30th hearing
17 understanding our obligations to be.

18 We asked --

19 THE COURT: Take me back, not to cut you off,
11:24AM 20 take me back to Friday for a minute. I'm still trying to
21 understand what happened with Dr. Patil I think you said
22 his name is that was problematic. They say it was an
23 inadequate deposition.

24 As I listened to you, I didn't hear you suggest
25 that there were any problems with that deposition. You

1 say he was prepared to talk about everything that was in
2 I think it was Topic Number 17, which kind of represented
3 really the essence of what we were all talking about and
4 how to value the TPUs and the like, so do you disagree
5 with this assertion that he was -- that he performed
6 inadequately, that he was not prepared to talk about all
7 of the areas that the parties had agreed would be fair
8 game at that deposition?

9 MS. YBARRA: I absolutely disagree. Dr. Patil
11:25AM 10 was extremely prepared, and he testified at length about
11 documents and analyses assessing the value of the accused
12 TPUs to Google.

13 He testified on numerous of those exhibits, and,
14 frankly, I mean he both prepared for the deposition as a
15 30(b)(6), and that is as he testified, it's part of his
16 every day job to be working with those kinds of analyses
17 and assessments.

18 THE COURT: So what did you understand
19 Singular's gripe about the Friday deposition to be as we
11:25AM 20 sit here right now?

21 MS. YBARRA: Your Honor, Singular did not object
22 that Dr. Patil was inadequately prepared at the time.
23 They deposed him for nearly the full seven hours. I
24 think it was 15 minutes less than that. They did not
25 hold the deposition open.

1 The first time that we heard that Singular
2 contends Dr. Patil was not adequately prepared was
3 Mr. Ercolini's 4 p.m. e-mail on Monday night.

4 It's really I think about after the fact, after
5 the deposition, they realized they hadn't gotten the
6 complete scope of their original topics as drafted and
7 are now coming back and bring us back to square 1 really,
8 and that is how we got to the instant at Mr. Shafiei's
9 deposition.

11:26AM 10 You know, we asked Singular, we suggested that
11 the parties postpone the depo so that we could seek
12 guidance from the Court because it's clear we had a big
13 disagreement here, and Singular refused and insisted that
14 we show up with Dr. Shafiei at 9 a.m. on Tuesday morning,
15 and so Mr. Shafiei appeared on Tuesday morning, and at
16 the start of the deposition, I attempted to state our
17 objections on the record to Singular's insistence that it
18 could spend the day questioning Mr. Shafiei by asking him
19 questions on topics that the Court had deemed improper
11:27AM 20 that we did not agree to provide, you know, Dr. Shafiei
21 as a witness on.

22 Mr. Ercolini suggested that I was contending
23 that, you know, we'd only let Mr. Shafiei testify if
24 Singular agreed to not ask for extra time. That's not
25 quite right, your Honor. This was about we were not

1 going to put Mr. Shafiei up, have Singular ask him, you
2 know, badgering questions all day about topics for which
3 he was not supposed to be testifying and then go back to
4 the Court and seek the complete scope of the topics.

5 Mr. Shafiei was not a 30(b)(1) deponent, he's
6 only testifying as a corporate witness, and so it would
7 be completely improper. Mr. Ercolini did not really
8 allow me to even get my objections on the record. He
9 consistently talked over and interrupted me.

11:28AM 10 THE COURT: So do we even know that there's
11 going to be an issue with respect to Mr. Shafiei? I
12 mean, no questions were even put to him, right?

13 MS. YBARRA: No, we do, we do know there's going
14 to be an issue because Mr. Ercolini made very clear that
15 he intended to examine Mr. Shafiei on the full scope of
16 Singular's topics as drafted, and that includes, for
17 example, the full scope of Topic 18.

18 This was a topic specifically discussed at the
19 June 30th hearing that your Honor said that's too broad,
11:29AM 20 we're not going to do that, and Mr. Ercolini did not
21 agree that the Court limited Singular's 30(b)(6) topics
22 in any way at the June 30th hearing, which I find really
23 astounding.

24 THE COURT: Hang on, Mr. Ercolini. I don't have
25 any of the paperwork in front of me. I can go back with

1 my clerks and my staff, and we can try to reverse
2 engineer, and, you know, we can sort of remember things
3 that we said, but help me understand from your
4 perspective, Ms. Ybarra, what was it that I said in my
5 view, this is not proper, this is overbroad?

6 I do recall saying that, I just don't have the
7 stuff here in front of me to read, but I do know that I
8 was looking at some of this, and I was saying, yeah, I
9 think this doesn't get to the nub of it, so what did I
10 say was overbroad?

11:29AM

11 MS. YBARRA: Your Honor, it was in the context
12 of talking about the topics seeking broad financial
13 discovery into all of Google's unaccused products and
14 services, like search and ads and things like that.

15 THE COURT: Okay.

16 MS. YBARRA: And we had talked specifically
17 about Topic 18, although it wasn't identified by name,
18 but, you know, it was recited almost verbatim into the
19 record, and you expressed your opinion that that was

11:30AM

20 overbroad and too sweeping, and after some discussion
21 with Mr. Ercolini on the record, you ordered Google to
22 produce a witness to testify about the value and benefits
23 of TPUs and/or analyses about, yeah, value and benefit of
24 TPUs. We agreed to do that.

25 You ordered Google to produce a witness on all

1 of the compromised offers that Google identified in
2 Exhibit D to its opposition brief and on the data center
3 topics, you also agreed the full scope of the data center
4 topics seeking detailed financial discovery into, you
5 know, costs and projections related to data center. You
6 said those were also overbroad. You said we're not going
7 to get into, you know, how much for concrete, how much
8 for this. You said, Google, produce a witness on the
9 average cost to build and maintain a data center, and
11:31AM 10 Mr. Shafiei was prepared to testify on that.

11 Mr. Ercolini was very clear about his intent to
12 examine Mr. Shafiei not just on that data center topic
13 but a whole host of others that your Honor had said no,
14 those are too much, and that's where we get into --
15 that's how we got here.

16 THE COURT: Okay. So, Mr. Ercolini, hang on,
17 let me go back to you because I'm really trying to do
18 this in a way that I can actually understand as we're
19 going along.

11:31AM 20 So we've got the issue with Dr. Patil on Friday
21 where Google is saying they're kind of shocked to hear
22 that you're saying that there was something improper or
23 unsatisfactory about the way that was done, and then
24 we've got the Tuesday deposition with Mr. Shafiei where
25 it seems to me really we're arguing about the scope as

1 much as anything else.

2 So let me go back to Dr. Patil for a minute.
3 What is it that you say was improper about the way that
4 Google and Dr. Patil behaved at that deposition?

5 MR. ERCOLINI: So Topic 32, again, to go back to
6 that, that topic was squarely within, and I'll just say
7 with respect to Ms. Ybarra's comments, I tried to read
8 from the record, a number of the things that she said are
9 factually incorrect, and I'd really like while we're all
10 in the light of day to make sure that those things are
11 run down so they don't just pass as accepted.

12 I did not demand that he be prepared for every
13 single topic. What I asked him was to confirm what
14 portions of the topics they would be preparing him for
15 and what they would not because Mr. Patil testified on
16 Friday we had an understanding of what the scope was
17 based on your Honor's rulings, and that extended to other
18 businesses, the benefits to other businesses, and
19 Topic 32 is squarely within that, and Google, Ms. Ybarra
20 said on the record that he would not be prepared to
21 testify on that. They made their own rendition of the
22 topic, which was a comparison of TPU v2 and TUP v3 vs.
23 other machine learning hardware.

24 THE COURT: Hang on, when we talked on
25 June 30th, did we talk specifically about topic

1 Number 32? I mean, did we use that number, or did we
2 talk more about what's in Topic 32?

3 MR. ERCOLINI: We talked about really exactly
4 what was in Topic 32.

5 THE COURT: All right. So I did not make a
6 specific ruling 32 is in, 32 is out, but you say I said
7 the things that are mentioned in 32 I said would be fair
8 game?

9 MR. ERCOLINI: I think there was only one topic
11:34AM 10 that was explicitly discussed. We had a number of
11 topics, and because we were short on time, we talked
12 about how much we were going to get into other business
13 units, and your Honor said yes, full Roth financials for
14 those other businesses are overbroad, but if Google has
15 done the analysis on other business units, if there are
16 benefits to other business units and they're tied to the
17 invention, that's within limits, and Topic 32 is squarely
18 within that.

19 THE COURT: All right. Did you try to ask
11:34AM 20 questions and were told I'm not prepared to answer, or
21 was this something at the outset you were told he's not
22 going to be answering anything in that area, and, thus,
23 you never broached it?

24 MR. ERCOLINI: Well, your Honor, we were
25 somewhat thrown for a loop by that and other topics.

1 Other topics Google had said that we had modified the
2 topic because we identified the portion of the topic that
3 was disputed, and that was now modified somehow in our
4 motion.

5 There were a number of other topics that
6 basically Google took the chart that Ms. Ybarra actually
7 said during Mr. Shafiei's deposition that the Court
8 prepared and said that we're prepared to testify in
9 accordance with this chart, which they said was agreed to
10 long ago during meet and confers.

11:35AM

11 Mr. Kamber said during that hearing that we
12 hadn't even met and conferred, but that topic, Topic 32
13 was squarely within. We had concerns over that and other
14 topics during that deposition that Mr. Shafiei, who was
15 to appear on Tuesday, and, again, we're three days out
16 from the close of fact discovery.

17 THE COURT: Okay. But listen, hang on, hang on,
18 you're kind of bouncing around. I'm focusing on Patil,
19 right, because Ms. Ybarra came to this imaginary that the
20 deposition came and went, and they didn't know until
21 Monday that you had a problem with what went on last
22 Friday.

11:35AM

23 What I'm trying to figure out is in your view,
24 was that wrong? Was there something on Friday that
25 happened where you said, hey, this is not compatible with

1 whatever we were talking about with Cabell, or this was
2 ruled to be an appropriate area of inquiry, and he's
3 telling us that he's not ready to talk about this? Was
4 there an event like that, or was this more upon
5 reflection following the deposition, you had this kind of
6 epiphany that it hadn't been as fulsome as you understood
7 it to be?

8 MR. ERCOLINI: No, your Honor, they told us that
9 he was not prepared to testify on that topic, and
11:36AM 10 questioning the witness beyond that, you know, we could
11 do that, but why are we going to do it when he says he's
12 not prepared?

13 THE COURT: When you say that topic, you're
14 talking about 32?

15 MR. ERCOLINI: I'm talking about 32. I have
16 gone through other topics. Basically it was Google's
17 rendition of what it took from the hearing, which was
18 really a narrow version of that and what it said it
19 agreed to, but that topic in particular is a glaring
11:37AM 20 example of we're squarely within what the Court decided.

21 We asked about it. They told us he was not
22 prepared to testify on it, he wouldn't be testifying on
23 it, and Google substituted its own topic, which was much
24 narrower and really kind of tangential to that topic.

25 THE COURT: All right. So, what is it you

1 wanted to explore with Dr. Patil that you were unable to
2 explore because either he wasn't prepared or they told
3 you he wasn't going to be answering questions in that
4 area?

5 MR. ERCOLINI: So, specifically any estimates of
6 the value of Google to the benefits of using the accused
7 products, including accrued search results, and we know
8 they've done that analysis, advertising placement,
9 increases in volume of search and advertising, increased
10 revenues attributable to the TPU, accused TPUs, profits,
11 advertising rates, and click-through rates.

12 We've seen analysis on that in documents. We
13 did not get a witness who could testify on that.

14 THE COURT: Now, Mr. Kamber or Ms. Ybarra, I do
15 recall saying that if there were analyses that already
16 been done, then it seemed to me fair on balance to have a
17 witness prepared to talk about them. Mr. Ercolini is
18 saying, hey, these are things that were done, so why
19 wasn't Dr. Patil ready to answer questions about those
20 subjects?

21 MS. YBARRA: Your Honor, Dr. Patil was prepared
22 to answer questions about analyses of the benefits
23 attributable to the accused TPUs, and he did testify
24 about that topic and several documents related to that
25 topic at length, and I want to be clear, there's a

1 distinction here between what I'm saying, analyses
2 regarding the benefits attributable to the accused TPUs.
3 That is Topic 17.

4 Mr. Ercolini is focusing on Topic 32, which is
5 about quantifications and estimates of the value of the
6 accused TPU, but then he goes on, including, you know,
7 improved search results, ad placement, increased volume
8 in search. It gets into the weeds on exactly what we
9 discussed at the hearing, gets into the weeds on Google's
10 unaccused products and business lines, but Dr. Patil did
11 testify about what we told the Court we would produce a
12 witness on at the hearing.

13 THE COURT: I'm not sure I'm following what you
14 said because I agree with you, I wouldn't have been
15 interested in green lighting inquiries into areas that
16 really related more to nonaccused products, but you
17 started by saying and he started, Mr. Ercolini started by
18 explaining these were, he was just sort of probing in a
19 logical way and going as far as he could in trying to
20 quantify the benefit and the value and the gain to Google
21 from using the accused products, and so if it turns out
22 that we are a more efficient company, we are a more
23 powerful company, our products work better and faster and
24 we can quantify that, our advertising revenues go up
25 because of this, and we can quantify that, that would

1 have fallen within the heartland of what I would have
2 thought to be fair.

3 So I'm hearing you say, you know, maybe some of
4 this is really detail oriented, and reasonable people
5 want to have mercy on a human being so they don't get
6 overloaded with too much minutia, but as areas of
7 inquiry, I thought I was suggesting that that was
8 appropriate.

9 MR. KAMBER: Your Honor, if I could just
11:41AM 10 interject here briefly, and then I'll turn it over to
11 Ms. Ybarra because you mentioned me, and I said that at
12 the June 30th hearing.

13 It's true, and I referred, I didn't refer to
14 Mr. Patil specifically, but I said we have a witness who
15 works on this stuff at Google, we will produce him as a
16 30(b)(6) witness.

17 That's on the record, and I said and we will
18 produce the documents that he has that are analyses on
19 these issues, the value, the quantifications, and
11:41AM 20 subsequent to that hearing, we did produce those,
21 including the impact on the ads business and other
22 businesses.

23 That material has been produced, and I'll let
24 Ms. Ybarra address the issue, but he was examined on
25 those documents and those things that I said we would be

1 putting him up on, so I'll turn it over to her.

2 THE COURT: Before you do, is this semantics? I
3 mean, are you saying, well, he was questioned on this,
4 but this is all missing the point here, which is they say
5 that there were areas we would have wanted to ask him
6 about where we couldn't because he wasn't prepared?

7 Now, one response to that is we produced the
8 universe of what existed. There might be some stuff that
9 he just doesn't know of because an analysis hasn't been
10 done in a certain area, so fairly he cannot be compelled
11 to answer something he doesn't know, but are you saying
12 that anything that's out there we produced and he was
13 ready to talk about anything like that?

14 Now, there might have been some areas where
15 Singular might have been interested in getting
16 information, but you know what, we just don't have
17 complete information in that area, and, therefore,
18 Dr. Patil couldn't be in a position to talk in an
19 educated way about it?

11:43AM 20 I guess I'm trying to understand where is the
21 point where we have the disconnect here where they say
22 this is an area we understood he was supposed to be
23 answering questions regarding, but for some reason, he
24 wasn't because the way you guys are continuing to pitch
25 this, he answered all the questions that were put to him?

1 MS. YBARRA: Your Honor, I think he did. I
2 think maybe where the disconnect is that we agreed that
3 Dr. Patil would be the designee in this area on this
4 topic under Topic 17. Topic 32 is worded differently.
5 It goes into more detail. We didn't agree, you know, we
6 didn't ever say Dr. Patil wasn't prepared to testify on
7 that topic, we said Google didn't agree to produce
8 Dr. Patil as a designee on that topic.

9 We thought that the Court's order related to
10 Topic 17, and this was the analyses about the benefits
11 and value of TPUs were captured under that. As counsel,
12 the examining counsel for Dr. Patil's deposition was not
13 Mr. Ercolini, it was Mr. McGonagle, went through topic by
14 topic and said you're prepared to testify on X, right?
15 That is where I objected, and said no, that's not what we
16 agreed to on Topic 32, but we did agree to provide that
17 information on Topic 17, and Dr. Patil did testify.

18 THE COURT: Let me own the snafu here, all
19 right. I'll take it because I certainly would have said,
20 if we want to use 32 as a shorthand, that that seems to
21 me to be fair as well because we're still talking big
22 picture about how Google benefited from having these
23 accused alleged products and being able to make use of
24 them.

25 I would certainly be sensitive to an objection

1 or a concern that the amount of detail that one person
2 would have to master in order to be able to answer all of
3 these questions is just going to be too much, so burden
4 and the onerousness, but that's different from
5 categorically speaking.

6 Categorically speaking, I think this still falls
7 under the broad penumbra of benefit to Google, gain to
8 Google from using these products, and, again, I go back
9 to the conversation Mr. Kamber and I had, and he just
11:45AM 10 acknowledged if there are analyses that have been done,
11 and that includes an area like revenue and advertising
12 and efficiency, I was assuming that what I was conveying
13 was that the witness should be able to answer questions
14 in those areas as well.

15 So if we had been talking about numbers, and it
16 had really been sort of keyed up for me that way, I
17 probably would have said, well, 17 and things related to
18 17 to the extent that they would allow Singular to have a
19 better sense of how Google has benefited or how just
11:46AM 20 generally the use of these products has affected what
21 Google does, and then we could have fought about how far
22 that goes and, you know, the like.

23 MR. KAMBER: I'm sorry.

24 THE COURT: No, go ahead.

25 MR. KAMBER: I just want to say, to be clear,

1 that's what I heard you say. That's what we heard you
2 say.

3 THE COURT: All right.

4 MR. KAMBER: And we were talking about it, I
5 think, in the context of 17. We're not saying we didn't
6 make a commitment on 32 or what have you. I think the
7 point that we're making is we agreed to 32 sort of
8 collapsing it with 17 to the same extent, that is, we've
9 produced those quantifications.

11:47AM 10 Dr. Patil talked about those quantifications to
11 the extent they exist. He's the person that does this.
12 We're not sitting here today saying we made no commitment
13 on Number 32 or we didn't hear you say explicitly you
14 also have to do 32. That's very much within our
15 understanding that we needed to present somebody on that
16 topic.

17 I think the issue or the disconnect, as
18 Ms. Ybarra said, is how are we now interpreting that?
19 We're interpreting it the way that we talked about it at
11:47AM 20 the June 30th hearing, whereas Mr. Ercolini in the
21 written correspondence has said we needed somebody on
22 the, quote, "full scope of the topic as noticed," as
23 though none of the other things had come to pass.

24 THE COURT: Okay. So I guess I'm still not sure
25 whether there's a "there" there as it relates to last

1 Friday. So, Mr. Ercolini, what I'm hearing collectively
2 from Mr. Kamber and Ms. Ybarra is, yeah, 32 was fair
3 game, and if you knew about it, I mean, if we had data
4 and analyses and studies and information, then he could
5 answer questions that related to that, so that really
6 there is no issue with respect to that deposition last
7 Friday because all of the topics that were considered
8 appropriate were able to be explored. What do you say to
9 that?

11:48AM 10 MR. ERCOLINI: Your Honor, we were given -- we
11 gave a topic that was specific as to those things.
12 Analyses of the benefits of TPUs is a much broader topic,
13 and it's very easy for counsel to object to that topic as
14 being outside the scope or as potentially including
15 anything. We were very specific.

16 THE COURT: Hang on. They're not saying it's
17 outside the scope, that's where I'm getting a little
18 frustrated. He's not saying it's outside the scope, he's
19 saying it's within the scope. He's saying maybe we
11:49AM 20 weren't calling it 32, maybe we were collapsing 17 and
21 32, but we understand what the Court big picture was
22 saying would be fair game. We had the person ready to
23 talk about it, and we didn't throw up any roadblocks.

24 Where are you saying the roadblock came in?

25 MR. KAMBER: So, your Honor, if I could

1 interject.

2 THE COURT: We can only have one person speaking
3 at a time. Mr. Seeve, if you want to take this, that's
4 fine, but what I don't want to do is trying to have a
5 whole bunch of folks talking at one time.

6 MR. ERCOLINI: I do want to respond, your Honor,
7 that Topic 32 was specifically the topic, and actually I
8 will let Mr. Seeve speak because he actually was present
9 at the deposition. We identified the topic, we asked him
11:50AM 10 what he had done to prepare. They said he was not being
11 presented on that topic. They're saying it was a
12 disconnect, it was subsumed under a larger topic. I
13 don't know why that would be, but there was an objection
14 to scope to every question that followed, and the witness
15 was not prepared to testify.

16 The witness merely answered, "That is what the
17 document says," "That is what the document says," "That's
18 what the document says."

19 THE COURT: So maybe what we explore, and I'll
11:50AM 20 hear from Mr. Seeve in a minute, but maybe what we
21 explore is just a supplemental, you know, we resume it
22 for, you know, two hours or something like that and
23 everybody goes in focused on something, but Mr. Seeve,
24 let me hear you.

25 This sounds to me like these are things that

1 happened, and these are things that can be dealt with
2 again usually by the parties just getting back together
3 for a very focused, limited no second bite type of
4 exercise, but, Mr. Seeve, let me hear you.

5 MR. SEEVE: Thank you, your Honor, and good
6 morning. I witnessed at least part of the deposition of
7 Dr. Patil, and so I think I can maybe bridge the divide
8 between what you're hearing from my colleague,
9 Mr. Ercolini, and what you're hearing from Mr. Kamber and
10 Ms. Ybarra about the deposition that he was prepared to
11 testify and did testify about all these topics.

12 I don't think you could call what Dr. Patil
13 offered last Friday testimony. The exhibits to the
14 deposition largely consisted of documents on which
15 Mr. Patil was a co-author, often the first listed author,
16 and he was asked about the contents of those documents,
17 and the most he would offer in response is this canned
18 response, "That is what the document states."

19 And we asked him, "Well, do you believe that to
20 be true?" He said, "Well, that's subjective," even on
21 documents for which he was the author, and I also want to
22 say that every single one of these questions drew a scope
23 objection from Ms. Ybarra, so to the extent that Google
24 is now saying that they didn't object to the scope and
25 that Dr. Patil's testimony was within bounds, as they

1 understood those bounds, Ms. Ybarra didn't agree with
2 that last Friday because every single question was
3 objected on the basis of scope. I wanted to clear that
4 up.

5 THE COURT: We've got problem-solving sleeves
6 rolled up here. As long as that objection to scope was
7 not followed by an instruction not to answer, I'm not
8 going to be too worried about it, but go on because,
9 again, I'm trying to focus on, okay, how do we deal with
10 this? Go on, Mr. Seeve.

11 MR. SEEVE: Understood. And, your Honor, I just
12 wanted to make it clear what we were talking about when
13 we were saying that Dr. Patil was not fully prepared to
14 answer these questions. It was just that he was giving
15 these sort of canned nonanswers. To the extent he was
16 prepared to testify about these topics, he didn't, and
17 that's where we're coming from.

18 THE COURT: Here's what I propose, and I know
19 you guys are sort of bumping up against some dates, and
20 what I need to do is speak to Judge Saylor just to talk
21 about some of this, but it does seem to me that it's
22 probably appropriate under the circumstances to authorize
23 another session with Dr. Patil but a limited session, one
24 that really goes to addressing what may have been a good
25 faith misunderstanding between the parties, so I'm not

1 prepared to make any findings here that one side has
2 acted improperly as it relates to this, one side has gone
3 outside the scope of what was authorized or that the
4 witness was instructed to answer in a way that ran
5 counter to the spirit of what I would have ruled, but
6 logistically is this something that can be arranged on
7 relatively short notice, that is, another session where
8 Dr. Patil is able to be corralled for maybe like four
9 hours and then counsel is given a chance then to explore
11:53AM 10 these areas where it may turn out they get the same
11 answers?

12 MS. YBARRA: Your Honor --

13 THE COURT: Go ahead.

14 MS. YBARRA: -- could I respond, please? So
15 Mr. Seeve was not present for the whole deposition.
16 Mr. Ercolini was not present, and I disagree that I
17 improperly objected on scope grounds.

18 The questions Dr. Patil was asked for hours
19 consisted largely of Mr. McGonagle's, Singular's counsel,
11:54AM 20 reading a sentence from a document and saying, "Do you
21 agree with it?" "That's Google position, isn't it?" And
22 sentence by sentence.

23 They were not proper deposition questions. They
24 were a waste of time. It's not Dr. Patil's fault. He
25 prepared for that deposition extensively, and I know

1 because I was there, and he is a senior engineer at
2 Google, and he took a lot of time out for this. If we're
3 going to be ordered to make Dr. Patil available for
4 deposition again, I'd ask that we have the opportunity to
5 brief this and your Honor can see the transcript and you
6 can see how Singular elected to spend seven hours with
7 Dr. Patil on the record because it was not a productive
8 day, and that's not the fault of Dr. Patil's.

9 THE COURT: Okay. Under the circumstances and
11:55AM 10 given time, here's how I'm going to have to deal with
11 this because, again, there's no pending motion before me.
12 What I'm hearing from Google is they don't believe they
13 have acted in any way that's inconsistent with the ruling
14 I've made. I can't make a finding one way or the other.
15 I wasn't there. I'm hearing the parties.

16 I do think that the easiest way to do this
17 honestly, old school days, you get the person back in the
18 room and you just ask some more questions, both sides
19 proceed in good faith, both sides try to make the
11:55AM 20 exercise as efficient as possible and try to figure out
21 what the problem is the first time and steer around that
22 and then with we're all done, but if we can't do that,
23 there is no pending motion, I don't have a record in
24 front of me, I don't have a transcript.

25 I think Singular, if you want to seek relief

1 from this, if you're going to want an opportunity to
2 re-question Dr. Patil in a manner that you think is
3 consistent with my rulings and what he should have been
4 prepared to do, I think you're going to have to file a
5 motion.

6 You can do it on up an expedited basis, and I
7 would make Google respond on an expedited basis, and we
8 would just deal with this down and dirty, but I think
9 that's the only way we're going to be able to get past
10 this, so either it's that was a lesson that we don't have
11 to re-learn or we will move on or we will seek relief
12 from the Court and an opportunity to question Dr. Patil
13 similar because it sounds like Google is saying they're
14 not wild about this idea of everybody sitting back down
15 together for a few hours, so that's how I would deal with
16 that.

17 Now let's talk about Shafiei for a quick minute
18 as it related to Tuesday, and, again, from what I heard
19 half an hour ago, it sounded more like tempers may have
20 escalated or passions may have escalated fairly quickly
21 before anybody knew it, the deposition just kind of blew
22 up even before it got started.

23 So, what can we do that's constructive here to
24 deal with Shafiei and that deposition and to make it
25 happen?

1 MR. ERCOLINI: Make sure just that it happens
2 immediately, your Honor, because we have three days left,
3 two days left until the close of fact discovery, and
4 we've been pursuing this for nine months.

5 You know, at the time of the deposition, there
6 was no motion for protective order, there was no
7 protective order. They can make their scope objections
8 during the deposition, but pulling the witness was
9 completely inappropriate, and we want to make sure we get
11:57AM 10 the witness because those topics are very important to
11 us.

12 THE COURT: So, Google, you don't have any
13 objection to producing the witness for examination,
14 right?

15 MS. YBARRA: We don't have any objection to
16 producing Mr. Shafiei for examination on the topics that
17 your Honor ordered Google to produce a witness on at the
18 June 30th hearing. What we do object to is sending
19 Mr. Shafiei in so that Mr. Ercolini can examine him on
11:58AM 20 the complete scope of topics that the Court already
21 deemed objectionable, and that's why we suspended the
22 deposition. We did it pursuant to Rule 30(d) and so we
23 seek relief.

24 THE COURT: Okay. Don't do that. All right.
25 Here's the way you deal with it. You produce the

1 witness, you've got everybody there. It's costing money.
2 You have your witness there, and you have him answer the
3 questions that you deem to be proper. You instruct him
4 not to answer the questions you deem to be improper. If
5 they don't like those instructions not to answer, they
6 can then seek relief from the Court, and we can fight
7 about whether they were outside the scope of the like,
8 but I think that's the better course to do, the better
9 course to follow, but really the issue is it seems to me
11:59AM 10 a disagreement over what the scope is going into the
11 deposition of what is permissible and what is not.

12 Is there anything that we can talk about now so
13 the parties leave with a mutual understanding of what
14 would be in bounds and what would be out of bounds for a
15 deposition of this individual?

16 MR. ERCOLINI: So, your Honor, I will say from
17 experience, you hear scope objections all the time during
18 a deposition. That's usually an objection to whether a
19 question is within the bounds of a notice topic. It's
11:59AM 20 not an objection to -- it's not within the bounds of or
21 it's outside the bounds of the topic that we substituted
22 for the topic that you noticed.

23 They can make -- this is the one vehicle of
24 discovery that is unique in this regard is that you have
25 to produce the witness prepared because it's costing

1 money because people have prepared, people are attending.
2 It's time, it's money that you are expected to file a
3 motion for protective order for the topics if you deem
4 them improper.

5 THE COURT: Sure. We're actually, hang on,
6 we're past that point. That's not responsive to what I
7 was asking. I agree with everything you just said. My
8 question is we're here now, so let's talk. Let's make
9 sure there's a mutual testimony if we're going to go into
10 that room and have that deposition of what's fair and
11 what's not fair. Can we do that?

12 We got all these smart people, reasonable people
13 here who know what the real issues are in this case. I
14 mean, I like to think if I turn it over to you guys just
15 to start talking, we can figure out really quickly either
16 there's no disagreement or here are the few areas where
17 we have disagreement.

18 Somebody help me understand. You know, imagine
19 ourselves in the room, the deposition is starting, you're
20 asking the questions. Where are we likely to have that
21 first instance where somebody is -- where Google is
22 saying objection as to scope?

23 MS. YBARRA: So, your Honor, I think on the
24 several topics that Mr. Ercolini was intending to
25 question Mr. Shafiei on regarding detailed financial

1 discovery into data centers, your Honor ordered Google to
2 produce a witness on one data center topic, the average
3 cost to build and maintain a data center, and we were
4 prepared to do that. As soon as Mr. Ercolini gets beyond
5 that, we're going to have a problem.

6 THE COURT: Okay. No, no, you're not incorrect,
7 but I fear that you're putting way too much into a
8 shorthanded way of me articulating what I thought was
9 reasonable. What I said was and what I tried to convey
10 was if you can generally come up with an average cost for
11 building one center because we know not every center is
12 created equal, there's always going to be different needs
13 and different requirements and the like, and just, you
14 know, the real estate part of it is going to drive some
15 differences, but I thought that would be a fair proxy to
16 help Singular understand and to help people quantify this
17 part of it in trying to understand the benefit or the
18 gain or the effect to Google on Google of being able to
19 use the accused products.

12:02PM 20 Beyond being able to come up with an average
21 amount, obviously, if there was more information there
22 that is not at the level, the granular level of how much
23 did we spend on nails and hammers but somewhere in the
24 middle without me trying to define what that was. I was
25 trying to convey -- I'm not here to say that that's out

1 of bounds.

2 I mean, they have a right to explore how Google
3 benefited from the use of these products, and if that can
4 be accomplished by providing some information and helps
5 one generally to understand, you know, we had to build
6 five less of these types of buildings and building other
7 types of buildings or constructs that we would have had
8 to work on, we could do it for half the cost.

9 I mean, so I think this is going to be more than
12:03PM 10 somebody saying here's what the average cost of a center
11 is, and I was leaving it to you guys as creatures of
12 reason to kind of figure out a mid-point where Singular
13 gets generally this information so they can quantify the
14 potential on damages and harm but nobody has to worry
15 about getting receipts from Home Depot about what the
16 price of concrete was. I mean, that's what I was trying
17 to convey.

18 MS. YBARRA: Your Honor, I think we've --

19 MR. ERCOLINI: If I may, your Honor, we can
12:04PM 20 actually I think short-circuit this because Google has
21 already done that analysis through and through on
22 megawatt requirements.

23 We've received a number of documents on that,
24 documents that we've recently produced that we've been
25 requesting through discovery. We have those. We have

1 detailed financials on the data centers, on their power
2 draw, on their space requirements.

3 Those documents it appears were prepared in a
4 number of cases for the litigation, so I think that those
5 documents that have recently been produced should be
6 within bounds, and I think that's a good midpoint. A lot
7 of those are detailed analyses on the financial benefits
8 of the TPUs, how many they have deployed, what the power
9 draw is, so I think that that's probably a good midpoint
12:05PM 10 where we're not asking about the nails, how much concrete
11 was poured, and those are really the main issues that
12 we're concerned with in the litigation because those are
13 the main benefits that are derived by the invention.

14 It is reduced power, and it is reduced
15 footprint, and so I think based on the documents that
16 they've produced, I think those should be within the
17 scope of what they're offering, and that was exactly my
18 concern, your Honor, was that all we were going to hear
19 about was what's the average cost for a data center
12:05PM 20 because they've given us detailed information that's a
21 lot more granular than that, and it really does vary. It
22 varies by county. It varies by where the real estate is.

23 There is no quote, unquote, "average data
24 center." There's only 10 at issue. It's not like we're
25 going to be all over the map on this. It's pretty

1 drilled down and really the spreadsheets are one sheet
2 apiece for the most part.

3 THE COURT: In your opinion, Mr. Ercolini, how
4 much time do you think you would need to explore this in
5 a deposition?

6 MR. ERCOLINI: Mr. Shafiei is a 30(b)(6). We've
7 got I think seven hours with him.

8 THE COURT: I know you've got seven hours. I'm
9 just curious how long do you think it would take to
10 explore all this stuff?

11 MR. ERCOLINI: It depends on what the objections
12 look like, to be honest. We're going to be very
13 straightforward. We don't want to waste time on this.
14 To be honest, we would have loved to have gotten done
15 last week, and, you know, we will be as efficient as
16 possible because we are dealing with a deadline, and I
17 think there are maybe a dozen depositions due to take
18 place over the next two days. It's not like we have the
19 resources to just be, you know, keeping him in the chair.
20 Nobody wants to do that.

21 MS. YBARRA: Your Honor, can I please respond to
22 Mr. Ercolini's comments and your comments, your Honor?
23 You're exactly right, there is a middle ground, and the
24 documents that Mr. Ercolini is referring to are documents
25 that Mr. Shafiei was prepared to testify about.

1 Google's, you know, spreadsheets on capital
2 expenses for data centers, operating expenses, retrofit
3 costs. He prepared extensively to testify on those, and
4 we will put him up on those.

5 We weren't interpreting your Honor's order that
6 we produce a witness on the average cost to, you know,
7 build and maintain a data center narrowly, we were doing
8 it in good faith, and we have the witness ready to go.

9 Where we're going to run into a problem, where
12:07PM 10 the fundamental dispute will be is when Mr. Ercolini asks
11 the witness are you prepared to testify on the full scope
12 of Topic X as drafted, and the witness, you know, when
13 the question is asked ignores everything that we're
14 discussing here.

15 THE COURT: So why does that need to be asked?
16 Why do you need to ask a question like that? Why can't
17 you just get into these areas, and, you know, I'm trying
18 to come up with a great analogy, and, you know, that's
19 the problem trying to coming up with one, but, you know,
12:08PM 20 we can all find many examples where you ask the question
21 you didn't really need to ask and thus created an issue
22 that may not have been there because I'm listening to
23 both sides.

24 Honestly, I'm not hearing that there really is
25 an issue, I'm hearing there's concern about this language

1 that has -- the witness that he or she is really supposed
2 to be prepared to talk about everything that's ever
3 happened at every time, but I hear Mr. Ercolini saying
4 that's not our interest, we don't want to do that, so why
5 can't we just have an understanding that here, the scope
6 of what we're talking about here, questions that are
7 based not only on what we talked about, the general cost
8 of these centers but also reasonable questions that flow
9 from the information that has already been provided by
10 Google to Singular on these topics so there's no chance
11 of a surprise by being shown a document that they haven't
12 seen before?

13 This is all kind of coming out of things that
14 strikes me Google will know the witness is likely to be
15 asked and thus will be prepared to answer. Can we just
16 agree to proceed that way?

17 MS. YBARRA: I would hope so, your Honor, but
18 Mr. Ercolini's rhetoric and his e-mail comments the night
19 before threatened to seek sanctions if the witness
20 testified he was not prepared to testify on the full
21 scope of the topics as drafted, and that is the backdrop
22 against which we're having this conversation.

23 THE COURT: I can say that sanctions, I mean,
24 it's always, you know, a volatile word to bring up, but
25 sanctions would really only be appropriate in a context

1 like this if the witness was refusing to answer whether
2 on instruction or not questions in an area where it was
3 already clear either from the Court ruling or from the
4 parties' understanding that that was going to be an
5 appropriate area of inquiry.

6 Now, we're here, it seems to me we got some
7 consensus as to what those appropriate areas are if we
8 for the moment, you know, Singular, I'm thinking, you
9 know what, I'm not going to go in and somehow for some
12:10PM 10 reason try to get the witness to sign something or agree
11 that, yes, I'm going to be prepared to answer in all of
12 these areas, and Google is going in and thinking we need
13 to have this person ready to answer fair questions in all
14 of these areas.

15 Maybe Google would decide at the end or maybe
16 Google can go in, even know there's a motion for
17 protective order pending and saying, you know, we can
18 hold that in abeyance, and Singular can say we will hold
19 in abeyance our potential concerns that we're going to
12:11PM 20 get blind-sided by a surprise objection and maybe an
21 instruction not to answer because it could be that
22 neither of those concerns rears its head in this
23 deposition and this deposition goes without issue.

24 Can we just try to get this on board and start
25 this and see how it goes? You've got seven hours, right?

1 And I know when we have meetings like this, I mean, it's
2 on everybody's radar screen. I think everybody is going
3 to be now highly vigilant about exploring those areas
4 that are fair and kind of staying on point and just
5 moving along and letting Mr. Shafiei then get back on
6 with his life.

7 If we were going to proceed that way, when can
8 we get that deposition to take place? It was going to be
9 on Tuesday. That didn't happen. When can it happen?

12:12PM 10 MR. ERCOLINI: If the witness is prepared, we
11 can do Friday. We want to do it before discovery closes.

12 THE COURT: I mean, obviously, I have to talk to
13 Judge Saylor whose deadline that is, but I think that,
14 you know, where we're talking about this, we can probably
15 assume that if it has to spill over into next week or
16 something like that, that's not going to be an issue.

17 Still, we should be looking to do this as soon
18 as practical. Google, when can you have Mr. Shafiei
19 ready to be deposed?

12:12PM 20 MS. YBARRA: Your Honor, certainly not tomorrow,
21 I think just owing to his schedule, but Judge Saylor did
22 say it was okay with him if depositions spilled over to
23 July 31st. I need to check with the witness and find out
24 when he's available, but we'd aim to do it within that
25 time frame.

1 THE COURT: Okay. I would say to the witness
2 only because I've been here before, not with you guys,
3 but in many cases, sometimes they may need to be made to
4 understand they may need to alter their schedule, and
5 that's not really a power argument as much as it is a
6 moving train, and everybody's got to play their part, so
7 I'm sympathetic.

8 We are in the heart of vacation season. We're
9 encountering this issue a lot, but if you do talk to him,
12:13PM 10 just help him understand the sooner he does this, the
11 better it is for everybody, the case moves along.

12 MS. YBARRA: I don't think we'll have a problem
13 on that front, I just don't want to commit to a specific
14 day on the record here where I haven't checked with him
15 at all.

16 THE COURT: All right. I'm just going to leave
17 that to the parties then to solve the logistics on that.

18 Now, let me go back for a quick minute to
19 Dr. Patil. I'm not going to revisit all that, but I am
12:13PM 20 going to say that that, I think, Singular, the ball is in
21 your camp. If you do think that things went so poorly
22 that there should be an opportunity for a redo, you're
23 just going to have to file something ASAP and we'll deal
24 with it that way, otherwise unless you guys talk and/or
25 you conclude that on balance it's not necessary for you

1 or worthy for you to go back and try to do that one
2 again.

3 MR. SEEVE: Understood, your Honor. Thank you.
4 We'll confer, and we'll decide whether or not we think
5 it's egregious enough to file something, but that makes
6 sense to us, your Honor.

7 THE COURT: Okay. So those are the obviously,
8 you know, our two big things. I don't have the e-mail in
9 front of me. I looked at it quickly. We've been going
10 12:14PM for an hour and 15 minutes. We don't have too much
11 longer. We're probably over the time we allotted, but is
12 there anything looming that you think in a few minutes we
13 can do something productive on?

14 MR. ERCOLINI: Your Honor, there are just a
15 couple of topics, and I think we can make this very
16 quick. We'll be very pragmatic about it.

17 There were a number of topics for which
18 designations were not provided. We're not going to get
19 into the rule, but one of those is Google's return on
20 12:15PM investment policy.

21 This is a very key issue in this case because,
22 you know, based on the capital expenditures that Google
23 has made on the TPUs, the return that they're suggesting
24 is -- it's sort of astonishing, but its corporate return
25 on investment policy, what it expends, and they produced

1 CapEx, they produced OPEX.

2 In terms of what it expects to get in a return
3 and profits, we should know about that because they had
4 this project going for several years. It's a key part of
5 most damages analysis nowadays, and so we would like to
6 get that topic designated, and we're not sure why it was
7 left off. There are a number of others one, but just to
8 be pragmatic that one is very important to us.

9 THE COURT: All right. So you've designated
12:16PM 10 somebody to talk about that. Google, do you have
11 problems with that, or is this just something you haven't
12 gotten to?

13 MS. YBARRA: Your Honor, this is one of the
14 subjects raised in our motion for protective order. We
15 have told Singular that Google does not have an official
16 corporate ROI policy, and that's why we're unable to
17 designate a witness on that. We've had that conversation
18 multiple times now.

19 As to the other topics for which Google did not
12:16PM 20 designate a witness, those were agreements -- those were
21 agreements reached with Singular in prior meet and
22 confers that memorialized in our opposition to Singular's
23 motion to compel that we feel like Singular has reneged
24 on in the last 48 hours, and so I think there's still
25 issues in the protective order need to be addressed, and

1 that's one of them.

2 THE COURT: I think those then will have to be
3 subject of motions, I just don't know that we're going to
4 be able to sort of go through and work through --

5 MR. ERCOLINI: I can make this very simple, your
6 Honor. If their contention is that that corporate return
7 on investment policy does not exist, then have someone
8 say it under oath that it doesn't exist, and it's as
9 simple as that, then we have it under oath, and we have
10 that response from Google.

11 THE COURT: Let me ask you a question. Why
12 can't -- I mean, did you ask it in an interrogatory? I
13 mean, those are usually signed by somebody that can bind
14 the company. Wouldn't that give you the same? I don't
15 know that we want to force people to all come together
16 and spend all that money just to have somebody say that
17 under oath if you can do the same by getting it in a
18 written interrogatory.

19 MR. ERCOLINI: Well, there's a 30(b)(6) witness
20 coming up. It seems like it would be very easy to
21 prepare him on that topic, but we are past the
22 interrogatory deadline. We're well past the deadline for
23 written discovery, and we had a limited number. You
24 know, we've gone back and forth on a number of those.
25 It's the only vehicle, and it's the vehicle that we

1 chose, and, you know, we basically --

2 THE COURT: I mean, I guess I don't know how I
3 feel about that, and so I don't want to say something off
4 the cuff that I later, you know, change, but I'm a little
5 bothered by it because when you've got counsel making a
6 statement say in response to a discovery request that we
7 don't a policy on this, usually you're not entitled to
8 then say, do you know what, bring somebody in under oath
9 and let me ask the question, just prove it.

12:18PM 10 Now, here's the asterisk. If you've got a basis
11 to suspect that answer is incorrect and thus it does
12 warrant further exploration, that's different. I don't
13 know enough about the details here, you know, to know one
14 way or the other whether that's something you should just
15 be accepting as a statement either from counsel or,
16 again, if it were in response to an interrogatory, I
17 understand you didn't ask it in an interrogatory, but I
18 guess, Google, you know, on the practical side of things,
19 if there are going to be other depositions, why can't you
12:19PM 20 just have somebody as part of that say, you know, by the
21 way, I am here to tell you we don't have an ROI policy,
22 and that way they've got it under oath, you're not
23 wasting time by having a whole lot of questions put to
24 somebody in that area, but if it turns out later that
25 that's incorrect, well, Singular has established that for

1 the record, and if it turns out it is correct, then it's
2 neither here nor there, and it took five minutes to
3 establish that.

4 MS. YBARRA: Your Honor, just to be clear, we
5 told Singular that Google does not have an official
6 corporate ROI policy on May 14th. That was 10 days
7 before the deadline to serve written discovery, and
8 Singular in fact served interrogatories after that date.
9 They didn't ask this question. They also didn't move to
10 compel testimony on this topic.

11 This is part of a larger problem that we reached
12 agreements on several topics on Singular's 30(b)(6)
13 notice that they have now abandoned at the eleventh hour
14 and are saying that Google has somehow acted improperly.
15 That's really a larger fundamental problem we're having
16 here with Singular's --

17 THE COURT: I don't think anybody is saying
18 they're acting improperly. Let me ask you, on May 14th,
19 when you made that representation, was that a
20 representation by counsel, or was that -- I mean, how was
21 that conveyed?

22 MS. YBARRA: That was conveyed by counsel in a
23 meet and confer on Singular's 30(b)(6) topics, the one
24 that we're speaking about now.

25 THE COURT: Mr. Ercolini, if you were to get a

1 letter from counsel on behalf of Google stating in simple
2 throws, Google has no corporate ROI policy, would that be
3 sufficient for your purposes?

4 MR. ERCOLINI: Well, your Honor, to the extent
5 we find evidence that contradicts that there is no ROI
6 policy, following up on that would be extremely
7 important.

8 THE COURT: I mean, that's my whole point, if
9 what they say is true, you're not going to find anything,
10 I'm just trying to figure out a way that we can do this
11 and make this a nonissue.

12 If you can establish for the record they have
13 taken a position on whether there is or is not a
14 corporate ROI policy, and it's about as official as it
15 gets, we've got an officer of the Court representing
16 Google who is stating to us in a letter that is being
17 written solely for this purpose to tell us one way or the
18 other whether it exists.

19 I can tell you, if you then find something that
12:21PM 20 suggests something in opposite to what's in that letter,
21 yeah, you'll have a basis for asking the Court to do
22 something.

23 My question is, okay, if you get that letter
24 though now, does that diffuse this as a potential issue
25 because otherwise I think the way we're going to have to

1 deal with this is it will have to be briefed.

2 I mean, that's just time and money, you know,
3 because I'm hearing you could have asked about this in an
4 interrogatory. You didn't. It was raised prior to the
5 deadline. You still didn't ask. You were actually told
6 in a meet and confer it doesn't exist, and so, gee, we
7 don't think we should have to bring a human being in and
8 put them under oath just to affirm something we already
9 told you.

12:22PM 10 MR. ERCOLINI: Judge, Ms. Ybarra said there were
11 a number of agreements prior to the motion to compel that
12 we filed, but we filed a motion to compel on several
13 topics that they claimed we had agreed to.

14 The requirement is that they designate someone.
15 If they say that something doesn't exist and we disagree
16 that it does, we're not at an obligation to put that into
17 another form of discovery. They have to designate
18 someone, and if it's just to designate someone to testify
19 that it doesn't exist, I can tell you, your Honor, we
12:23PM 20 have indications that that does exist.

21 THE COURT: That's different. So, 1, I don't
22 know whether I agree with you that if they tell you
23 something doesn't exist, they still have an obligation to
24 produce somebody to talk about it. I don't know that
25 that's true, but here's the part that matters.

1 I mean, you're telling me, do you know what, I
2 have a basis to believe it's not true, so that's the
3 concern. If that's the concern, I would say, you know,
4 what, Google, you should just have somebody prepared to
5 come in and spend five minutes to say, I don't care what
6 you heard, it doesn't exist, but, Singular, if you think
7 it does, show them what you got. I mean, tell them
8 here's why we think there is something there.

9 Maybe the lawyers don't know what somebody else
10 in the company might know, and maybe this is just a
11 matter of, all right, a little more conversation,
12 internal conversation on their side, and, you know,
13 something might come up, and that might, again, help this
14 move along, but I don't want something as simple as this
15 to all of a sudden end up being the subject of a whole
16 bunch of motions back and forth where you guys are sort
17 of close to the end of things.

18 MR. ERCOLINI: It sounds like according to
19 Google, they think it's relatively noncontroversial, so I
12:24PM 20 don't think it should be if what they're saying is
21 correct, but, you know, if we have countervailing
22 evidence, I think we have an obligation to our client to
23 look into that.

24 THE COURT: Are there still depositions to take
25 place on subjects where the likely designee for those

1 subjects would also be somebody who with credibility
2 would be able to say whether there might exist or does
3 not exist a corporate ROI policy because if the answer is
4 yes, we're still going to be deposing somebody on the
5 corporate side of things to talk about A, B and C, why
6 not just throw this in and with an understanding that all
7 the person is going to be prepared to do on that is state
8 one way or the other whether there is a corporate policy?

9 Now, Mr. Ercolini, if we go that way, I mean,
12:25PM 10 here's what I wouldn't want to have happen, all of a
11 sudden some surprise where all of a sudden you bring out
12 some documents and you say, well, what about this? I
13 mean, I'm not interested in setting up that sort of
14 exercise, but if you really have a legitimate basis, if
15 you have a legitimate basis to worry that there is a
16 policy, help them understand why that is the case, and
17 then I might be more amenable to saying, you know what,
18 in light of this past where they've already told you this
19 and you had an opportunity to explore it, I'm still going
12:25PM 20 to say, okay, go ahead and try to depose somebody on
21 this.

22 Is that something you can do, or is this sort of
23 on information or belief or your understanding of how
24 businesses operate and how it just seems to you to be
25 just so unlikely that they wouldn't --

1 MR. ERCOLINI: No, no, I don't think it's based
2 on inference, and I have to speak with my expert about
3 it, but my understanding is there is pretty specific
4 policies, and I'll just say because you asked about the
5 witness that was available to testify on this,
6 potentially, Mr. Shafiei who did not appear on Tuesday is
7 the finance manager and capital markets analyst for
8 Google. He's been there for 11 years. I think if
9 there's a return on investment policy, he would probably,
10 if he doesn't know, he could probably be educated on it
11 fairly quickly, and it's as simple as that.

12 We're not intending to go on a fishing
13 expedition. It's not worth our time to go in there and
14 say, oh, that's incredibly unlikely, are you kidding me?
15 We'll go in with specific evidence.

16 Giving that to counsel before the deposition
17 when they're telling us that it doesn't exist, I don't
18 know how comfortable I feel about doing that. I don't
19 think it's entirely fair to Singular to have to disclose
20 why it doesn't believe what Google has told it and to
21 provide the evidence so that they can, you know, come up
22 with a prepared response for why it's undercut by that.

23 You know, impeachment really doesn't work that
24 way, but we're not trying to get anyone, we're just
25 trying to establish whether or not it's true and then,

1 you know, what are the indications that it's not when
2 they say...

3 THE COURT: So, Google, here's what I would
4 suggest, respectfully, to you folks, to the lawyers, I
5 think you need to go back and talk to your client, and I
6 think what you have to say is, look, based on what we're
7 talking about in court, Singular really has a basis to
8 think there's a policy. We've said there isn't. The
9 Court thinks, the Court says if there is a policy, it's
12:28PM 10 probably okay to ask questions about it, and we'd have to
11 make somebody available.

12 We, the lawyers, don't want to have egg on our
13 faces by it becoming apparent that there is a policy when
14 we said there isn't, so maybe if you can have a further
15 conversation with somebody on this, but having said that,
16 Mr. Ercolini, I still don't know that it's appropriate
17 for me to do anything, I mean, to rule at all.

18 I mean, I take counsel -- you know, lawyers are
19 officers of the Court, and when they come in and they say
12:28PM 20 we've made a statement as to something, I don't have a
21 basis to challenge that, and I understand you don't want
22 to necessarily tip your hand by explaining why you may
23 disagree with it, but if you're not going to do that, I
24 don't really have a basis to say, well, I'm going to make
25 them designate somebody anyway.

1 Here's the principle I'm worried about because I
2 can tell you are shaking a bit. The principle I'm
3 worried about, it can't be the case that one side can say
4 we have no policy in the following areas and then yet be
5 compelled to produce somebody under oath to talk about
6 those areas, even if it's just to say, as we indicated
7 before, or as you were told before, there is no policy,
8 absent some evidence to suggest that that first assertion
9 may be incorrect, and if you can't give me that, I just
12:29PM 10 don't know that I can do anything.

11 MR. ERCOLINI: Your Honor, if I could just
12 respond to that. If Google's going to go back and ask
13 its client whether or not there's a policy, I want to be
14 clear about what that means. It doesn't necessarily mean
15 oh, well, there's a document that says here's a return on
16 investment policy or here's a one sentence return on
17 investment policy, but what Google suggested in this case
18 is that essentially a 400 to 1 capital investment to
19 profit ratio for a project that's gone for five years is
12:30PM 20 somehow within the bounds of their return on investment
21 policy.

22 We have a right to probe whether or not Google
23 would have made an investment like that and continued a
24 project whose capital expenses were 400 times the profits
25 of what they say, you know, the invention gave them.

1 I think that that's -- it's a very sensible
2 topic, and it's clearly something that smacks of
3 absurdity to suggest that probing that I think is
4 important.

5 I want to just make sure that when they go back
6 and say is there a policy, someone doesn't say, well,
7 there's no policy because the policy is defined as, well,
8 there's a document that says here's our policy. It's
9 probably grayer than that, but I do think that we have a
10 responsibility to probe that, and that is a
11 responsibility to our client.

12 THE COURT: All right.

13 MR. KAMBER: Your Honor --

14 THE COURT: Maybe there's a couple of different
15 things there. One, it sounds like you're almost talking
16 about somebody said something about 400 to 1
17 differential. That's not necessarily the same as saying
18 there's a policy, but, anyways, Mr. Kamber, what do you
19 say?

12:31PM 20 MR. KAMBER: We can go back and talk to our
21 client about this, but the problem is it's the day before
22 the close of fact discovery and this is coming up, and
23 just to set the table, Mr. Ercolini and I met and
24 conferred on the 30(b)(6) topics on May 14th, including
25 the ROI policy, and we said there isn't somebody, we

1 can't put somebody up.

2 If Mr. Ercolini said, you know what, I think you
3 do have somebody, you should go back and figure this out,
4 then we could have done something about it at the
5 appropriate time. That was over two months ago, but here
6 we are.

7 We had our objections. We noted them. They did
8 not move on the ROI topic. They moved on various
9 different 30(b)(6) topics. We came into this court, we
10 said we have a dispute about this number, I think it was
11 16 at the time, but I can't be sure. We said there's a
12 dispute. Do you have any other disputes? No.

13 This was not a topic that was moved on. We
14 listed it in that Exhibit D to our opposition as one
15 where we had met and conferred. We had not offered a
16 witness, and they had not moved on it.

17 To be here now and to have Mr. Ercolini -- this
18 is a different issue than we had a fight about scope, and
19 there's some disagreement about what the Court may have
20 ruled or may not have ruled, there's no disagreement
21 here. This was not moved on, this was not ruled on,
22 and --

23 THE COURT: Hold on, the fact that it was not
24 moved on or ruled on is a bit of a red herring here
25 because really the issue here is a really simple one. Is

1 there a policy or is there not a policy? You guys say
2 no. They say we think there might be.

3 Now, then all those other things come in and add
4 these layers to it, so we're going to trying to analyze
5 this, you know, then we might have to consider, well, did
6 you raise this timely? Was it the subject of a specific
7 conversation? What's your basis for thinking there might
8 be something? You know, who was it that made the
9 statement that we don't have anything? Is that reliable?

12:33PM 10 But it all begins with is there a policy or is
11 there not? I guess I don't know, Mr. Kamber, why Google
12 seems to have some resistance to listening to you guys,
13 although you haven't said explicitly.

14 Having somebody prepared to say, yeah, we've
15 looked, I mean, you keep asking about this ROI policy.
16 We don't have anything like that. So, you know, do with
17 that what you will.

18 Are you resistant to that? I get it, you say we
19 already talked about this, but if we're going to have
12:34PM 20 Mr. Shafiei, if we are going to have a deposition that's
21 going to take place probably within the next five days or
22 so or six or seven days, and this really is a nothing
23 burger, why can't we just roll it in and say without
24 waiving any objections we have to your right to even try
25 to be exploring this at this juncture, we'll have

1 somebody there just to remove any ambiguity and to
2 declare, as we told you before, that there is no policy.
3 Is that something that you have a problem with?

4 MR. KAMBER: A little bit for two reasons, your
5 Honor. One is the practical one that, you know, if
6 Mr. Ercolini had thought this was an issue, we could and
7 should have been talking about it before where he said,
8 you know, sorry, counsel, we don't believe you, we think
9 there's this other thing, and we could have figured this
10 out over the last two months.

11 The other one is that this is clearly now an
12 attempt at sandbagging. This isn't about a 30(b)(6).
13 He's saying I need you to put somebody up because I've
14 got dirt on you and I want to cross-examine the guy, and
15 that's the only reason.

16 He doesn't want to ask the question, do you have
17 an ROI policy, he wants to hit whatever this witness is
18 over the head with whatever documents or whatever
19 information that he has. That's not really the
20 appropriate thing at this point, particularly given the
21 history here.

22 THE COURT: I mean, well, and just sort of
23 playing that out one step further, Mr. Ercolini, kind of
24 a victory if they do not know what it is you would want
25 to probe and they thus can't -- it's most likely they're

1 going to have somebody there who is going to say we don't
2 have a policy that I know of, and then all of a sudden
3 you produce a document that suggests differently, well,
4 that witness still isn't going to be able to give you any
5 information because he or she wouldn't haven't been
6 prepped on whatever it is you've got in your hand.

7 They would have been operating on the same
8 information that Mr. Kamber and Ms. Ybarra have, which is
9 there isn't anything here, so I mean, then you'd be stuck
10 having to come back before the Court and saying, okay,
11 this is what happened, and now I want an opportunity to
12 probe some more about this, so, you know, I don't know
13 what to tell you guys.

14 MR. KAMBER: Can I raise one other practical --

15 MR. ERCOLINI: The complaint seems to be that we
16 didn't believe them enough at the time that they --

17 THE COURT: No, no, no, that's a
18 mischaracterization. No, the complaint is you didn't
19 raise it, you didn't put it on the radar screen. They
20 told you in mid-May there's nothing there, and now all of
21 a sudden we're hearing at the eleventh hour that you want
22 to have somebody there to talk about it, and, in fact,
23 you do think there's something there. That's the issue.

24 MR. ERCOLINI: Your Honor, the obligation,
25 again, I hate to go back to what the requirement is for

1 depositions in 30(b)(6). If you fail to designate, you
2 have failed to appear, and they failed to designate. We
3 are not required to move to compel. It is the one
4 vehicle of discovery.

5 THE COURT: What's your authority to support
6 that proposition when what you heard from counsel was
7 there is nothing on this particular subject, so there's
8 nobody to put before you to talk about it? Are you
9 saying that even in that instance, they need to have
10 somebody there to affirm that there is nothing there, and
11 the failure to do that would in essence be a failure to
12 appear?

13 MR. ERCOLINI: Your Honor, during the June 30th
14 hearing, we heard the analyses that didn't exist, you
15 know, were subsequently produced.

16 THE COURT: Okay.

17 MR. ERCOLINI: So we can credit what counsel
18 says, but we're going to do that to a point, and to go
19 back to your point, they just say that it doesn't exist,
20 then, you know, even if it ends there, at least we have a
21 confirmation on the record that that's the case, and if
22 it proves not to be true, you know...

23 THE COURT: Let me do this. Why don't I do
24 this. You guys tell me, you know, I was thinking I'm
25 offering something that's an easy way out and both sides

1 tell me, no, that doesn't work. Why don't I authorize
2 one supplemental written interrogatory, ask the question.
3 You're going to get Google responding under oath, I mean,
4 you know, somebody binding Google.

5 You can have time to go back and formulate the
6 question that would give you the information that you're
7 looking for, and then we can proceed based on that. You
8 guys can go back and pound that out right now and send it
9 over to them this afternoon. How about that?

12:39PM 10 MR. ERCOLINI: It is a different vehicle of
11 discovery, your Honor, because they can withhold the
12 response based on objections.

13 THE COURT: No, there's no objection. We can
14 talk about that right now. You're right, we're here
15 right now. I don't know what the objection would be.
16 It's relevant if it exists. If there's a policy, I don't
17 know why it would be onerous or burdensome to produce it,
18 right?

19 We're not talking about going back and crafting
12:39PM 20 something, we're saying if you got this, you know, does
21 something exist, and, if so, I guess maybe a supplemental
22 RFP as well, give us a copy of it.

23 MR. ERCOLINI: I can tell you what the
24 objections to that are going to be, We object to the term
25 corporate return on investment policy as vague,

1 ambiguous, overbroad, and we're going to get a response
2 that is subject to those objections.

3 THE COURT: But you could define it, you could
4 define it, you can say when we use that term, we use it
5 to mean any number of documents that might go by a
6 similar names such as blank, blank, blank or blank.

7 The rules require a party, even if they're
8 objecting, to identify whether there is responsive
9 information, so we need to know whether it's worth it to
12:40PM 10 have a fight, so even if they object, Google would still
11 have to say there is something actually out there that's
12 responsive to this request, we just don't want to use it.

13 It gets something, but you're not wild about
14 that I can tell.

15 MR. ERCOLINI: I expect to then see an objection
16 to the definition. I just think a deposition just
17 answering that question, even if it's just that question.

18 THE COURT: What's the question going to be?

19 MR. ERCOLINI: Is there a corporate return on
12:41PM 20 investment policy?

21 THE COURT: And if the answer to that question
22 is no, you're going to come up with a document, and
23 you're going to try to get this person to then answer a
24 series of additional questions that they're not going to
25 be in any position to answer, and then what do you do

1 with that?

2 MR. ERCOLINI: Well, that they are not on the
3 documents, that they didn't author the document, they
4 wouldn't have had knowledge of it by some other
5 circumstantial evidence.

6 There are other reasons that they might have
7 reason to know that. In terms of how far beyond that we
8 probe, I don't think it's anyone's interest on going on a
9 fishing expedition, but, you know, we're not trying to
10 hit someone over the head. We are actually trying to get
11 at that information because it's important for expert
12 reports.

13 Even getting that they said no corporate return
14 on investment policy exists response, you know, I've said
15 my peace on that. I'm not wild about the interrogatory
16 because I don't want to be here in a few weeks on a
17 motion to compel for response.

18 THE COURT: I'm also not necessarily wild on the
19 principle about compelling them to have somebody prepared
20 to answer something where they've already told you there
21 was nothing there and you're not prepared to explain why
22 you disagree with that, so that's more from a kind of
23 middle.

24 You can imagine somebody in my position, the
25 precedent that that may create in future cases where

1 somebody will say, well, just because they represented
2 under pains and penalties of perjury they don't have
3 anything, you still should tell them to do all these
4 other things, so I'm worried about that.

5 Mr. Kamber, Ms. Ybarra, what can you offer as a
6 way to completely diffuse this? Can you have
7 somebody -- well, if it's the person we're talking about,
8 can you have him prepared to offer any information on
9 this as to whether there is something reassembling a
12:43PM 10 policy understanding that if they say no, they may then
11 be shown a document and asked, you know, the sort of
12 standard, do you recognize this or do you not recognize
13 this?

14 MR. KAMBER: I mean, I think I could fairly say
15 that we could have Mr. Shafiei or somebody else give what
16 they know. Part of the issue here is that it's 30(b)(6)
17 testimony. This is a witness who's prepared for hours.
18 He's talked to at least half a dozen, maybe 10 people in
19 preparation for the testimony because, as Mr. Ercolini
12:43PM 20 pointed out, there are a lot of spreadsheets, detailed
21 spreadsheets we produced that he has prepared himself to
22 testify on, and any of those conversations he could have
23 asked, hey, by the way, do you know of a corporate ROI
24 policy, but we can't redo that, unfortunately.

25 THE COURT: I understand.

1 MR. KAMBER: The problem is it's late.

2 THE COURT: I understand. We're not talking
3 about that, we're talking about doing it now, about
4 asking one person, giving an opportunity do you know
5 anything about this, but the difference being you guys
6 ahead of time now have the foresight and the opportunity
7 to sit down with the designee to say, look, you're going
8 to get a question in this area. It behooves us all to
9 know whether there's something there or not.

12:44PM 10 MR. ERCOLINI: And counsel actually already
11 knows that because they already told us that it doesn't
12 exist, they've asked Google, so whomever they asked I
13 think should probably be the person to speak with
14 Mr. Shafiei.

15 THE COURT: Well, I don't instruct folks on how
16 to go about preparing their witnesses, but I'm sure they
17 understand how things work there and would do this
18 appropriately, so...

19 MR. KAMBER: And we need to figure out if
12:44PM 20 Mr. Shafiei is the appropriate person. Mr. Ercolini says
21 he is, but Google gets to pick who it is that's going to
22 testify on this topic ultimately. As a practical matter,
23 it may be him, but it may be that we want or need
24 somebody else, for better or worse.

25 THE COURT: Well, I was just thinking only

1 because if you guys are concerned about wrapping these
2 things up --

3 MR. KAMBER: Right.

4 THE COURT: -- and this really is going to be
5 the tail of the tail of a dog, it just seems to me the
6 easiest way to do it is just to have him prepared to
7 comment on it and then go from there.

8 Mr. Shafiei, I would take no position though of
9 what happens if, you know, you end up with a transcript
10 12:45PM that shows we asked the witness, we showed the witness a
11 document, the witness was not prepared to answer all of
12 the questions we had about that document, and we now,
13 therefore, should be entitled to do more.

14 I don't know how I would react to something like
15 that in light of this record. I'm just saying I haven't
16 had a chance to think about it, so you shouldn't assume
17 that if we go through this exercise and you get an answer
18 like that that it's going to mean that further discovery
19 is going to be appropriate, and you'd have to go very
20 12:46PM incrementally at that point.

21 MR. ERCOLINI: I agree, your Honor, and
22 hopefully we don't come to it. I desperately hope that
23 we don't come to it because I would love discovery to
24 come to an end.

25 THE COURT: All right. So, now, again, we're

1 not ruling on anything. I mean, we're talking about
2 possible ways to address some of these issues, and it
3 does seems to me that we have come up with some things
4 that could be a way in terms of how to deal with some of
5 these.

6 So I think, Mr. Seeve, you said you guys will go
7 back and reflect as it relates to the Friday deposition
8 and whether you wanted to do anything with respect to
9 that.

12:46PM 10 As it relates to the Tuesday deposition, maybe
11 we're going to have that take place next week and people
12 rather than sort of bear their chest and start
13 articulating all their worries at the outset will
14 actually just get into the deposition, and hopefully it
15 will go without issue, and Google will, it seems to me,
16 is going to consider having that person maybe also be a
17 person who can put to bed this issue of whether there is
18 an ROI policy, and Singular will just roll with the flow,
19 and if that gives rise to any further issues, we'll deal
12:47PM 20 with those when they arise.

21 One thing I may regret, but I'll just say it, if
22 you tell me the day the deposition is going to take place
23 and I am here, sort of like with the Superior Court,
24 where you could sometimes when a deposition issue arises
25 just reach out to the Court and get the ear of somebody

1 and saying, look, here's an issue, what do you think
2 about this, I'm okay with making myself available in that
3 regard if you want, so if you want me to sort of just be
4 loosely on standby, if you want to let Ms. Russo know
5 when the deposition is going to take place, there's no
6 obligation to reach out to me at all, and I'm also not
7 committing that I would automatically be available, but
8 if it is a day I'm working, I can offer that.

9 MR. ERCOLINI: We greatly appreciate that, your
12:48PM 10 Honor.

11 THE COURT: All right, so let's go that way.
12 It's 12:48, people must be hungry, so is this a good time
13 to call it a day and let people get on with their lives
14 or is there anything else?

15 MR. SEEVE: Your Honor, there is one other issue
16 that was raised in our letter, and I hate to prolong.

17 THE COURT: I shouldn't have asked, I should
18 have set we're all set.

19 MR. SEEVE: I think I can cover it in 15
12:49PM 20 minutes.

21 THE COURT: That's too long. We would have to
22 take a break. If it were five minutes, I'd say let's
23 rally and let's do it, but I know Ms. O'Hara has other
24 obligations, as do I. I'm sorry, we just did not expect
25 that we were going to be actually going beyond noon

1 today.

2 MR. SEEVE: Understood. If your Honor would
3 allow me, I could try to cover it in five.

4 THE COURT: The problem is there's stuff that's
5 going to be coming from the other side and it's going to
6 be a discussion, that's the part. You might be able to
7 cover it in five, I just don't think we can resolve it in
8 five.

9 Ms. Porto, you were going to say something?

12:50PM 10 MS. PORTO: Your Honor, I was just going to say
11 Google has some outstanding discovery requests we were
12 hoping to discuss very briefly.

13 THE COURT: I do think that probably we're going
14 to have to resolve it now. As it relates to outstanding
15 discovery requests, if these are things where there's a
16 request and for some reason it hasn't been responded to
17 and now they're saying to our surprise they don't have to
18 respond to it and we think that's an issue and we might
19 be filing a motion, that's what we convene these informal
12:50PM 20 conferences for, not so much is this going to be coming,
21 we haven't heard from them. That, I think you guys need
22 to work out yourselves, so I'll leave you with this in
23 closing:

24 1, let Ms. Russo know if you want me to be on
25 standby; but, 2, in the interim, why don't you guys talk

1 and say, if we get back together with Cabell, here's sort
2 of a small list of things that we do think we can talk
3 about with him and deal with within the span of an hour,
4 and then I'll try to make time for you guys sort of
5 within the next few days. We can't just do it anymore
6 today.

7 MR. ERCOLINI: Thank you, your Honor.

8 MR. KAMBER: Thank you, your Honor.

9 THE COURT: Thanks, everybody, good luck with
10 things going forward. I'm sure I'll be talking to you
11 soon.

12 MR. ERCOLINI: Understood, your Honor, thank
13 you.

14 (Whereupon, the hearing was adjourned at
15 12:50 p.m.)
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 83 inclusive, was recorded by
me stenographically at the time and place aforesaid in
Civil Action No. 19-12551-FDS, SINGULAR COMPUTING LLC vs.
GOOGLE LLC and thereafter by me reduced to typewriting
and is a true and accurate record of the proceedings.

Dated July 26, 2021.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER